

1 James R. Condo (#005867)
Amanda C. Sheridan (#027360)
2 SNELL & WILMER L.L.P.
One Arizona Center
3 400 E. Van Buren, Suite 1900
Phoenix, AZ 85004-2204
4 Telephone: (602) 382-6000
jcondo@swlaw.com
5 asheridan@swlaw.com

6 Richard B. North, Jr. (admitted *pro hac vice*)
Georgia Bar No. 545599
7 Matthew B. Lerner (admitted *pro hac vice*)
Georgia Bar No. 446986
8 NELSON MULLINS RILEY & SCARBOROUGH LLP
Atlantic Station
9 201 17th Street, NW, Suite 1700
Atlanta, GA 30363
10 Telephone: (404) 322-6000
richard.north@nelsonmullins.com
11 matthew.lerner@nelsonmullins.com

12 *Attorneys for Defendants*
C. R. Bard, Inc. and
13 *Bard Peripheral Vascular, Inc.*

14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 IN RE: Bard IVC Filters Products Liability
17 Litigation

No. 2:15-MD-02641-DGC

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO
DISQUALIFY ROBERT
VOGELZANG, M.D. AND KUSH
DESAI, M.D. AS TESTIFYING
EXPERTS; AND SCOTT RESNICK,
M.D. AND ROBERT
LEWANDOWSKI, M.D. AS
CONSULTING EXPERTS FOR
PLAINTIFFS**

(Assigned to the Honorable David G.
Campbell)

1 The fundamental issue in disqualification of experts is protecting one party from
2 being unfairly disadvantaged when its confidential information is in the hands of an
3 opposing expert. Bard maintains that its confidential information—indeed, opinion work
4 product that Rule 26(b)(3)(B) says that courts must protect—is in the hands of Drs.
5 Vogelzang, Desai, Resnick, and Lewandowski. The plaintiffs’ response brief and the
6 affidavit of Dr. Resnick reinforces Bard’s position.

7 The thrust of the plaintiffs’ response is that Bard has not identified any confidential
8 information that Dr. Resnick received. To meet the plaintiffs’ demand for more
9 information, however, Bard must reveal the very confidential information and opinion
10 work product that it has filed a motion to protect. Rather, Dr. Resnick’s affidavit and his
11 consulting agreements with Bard provide sufficient detail about the types of confidential
12 information that Dr. Resnick received. Dr. Resnick attests that counsel for Bard provided
13 him with medical literature and medical records for review and discussion. Ex. 3 to Pl.
14 Opp. Br., at ¶ 2. This alone amounts to revealing confidential attorney work product to
15 Dr. Resnick. *See, e.g., Rhodes v. E.I. Du Pont De Nemours & Co.*, 558 F. Supp. 2d 660,
16 671 (S.D. W. Va. 2008) (“Courts acknowledge that the document selection process
17 “represent[s] the mental impressions of [the party’s] counsel and [is] protected work
18 product.”) (citations omitted); *see also, e.g., Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.
19 1985) (“We believe that the selection and compilation of documents by counsel . . . falls
20 within the highly-protected category of opinion work product.”). Dr. Resnick attests that
21 he had an in-person meeting with counsel for Bard that lasted for approximately three
22 hours concerning these issues. Ex. 3 to Pl. Opp. Br., at ¶ 5. Dr. Resnick also attests that
23 he has consulted for Bard “for many years, dating back to 2003,” concerning IVC filters
24 and other products. *Id.* ¶ 9. Likewise, Dr. Resnick attests that he was involved in two
25 separate animal studies as part of his consultation with Bard concerning prototype IVC
26 filters and adverse events associated with those filters. *Id.* ¶ 10. Bard’s counsel also
27 represents that Dr. Resnick received core work product—counsel’s mental impressions of
28 plaintiffs’ arguments and evidence, Bard’s arguments and evidence, counsel’s thoughts

1 about all of the these issues, forward thinking discussions about expert opinions and
2 expert discovery issues, and previewing trial themes. Finally, the numerous consulting
3 agreements describe Dr. Resnick's role with Bard's IVC filters over the years, as
4 discussed in Bard's motion (*see* Mot. at 2-3). In short, Dr. Resnick clearly received
5 confidential and protected information about Bard's IVC filters.¹

6 The plaintiffs' argument that Drs. Vogelzang and Desai have been instructed "not
7 to consult in any manner with Dr. Resnick on this case going forward" (Pl. Resp. at 2),
8 does not cure the harm to Bard and serves as an implicit acknowledgement that
9 Dr. Resnick should never have been involved as an expert for the plaintiffs. Moreover,
10 Dr. Resnick and his Northwestern colleagues are inextricably linked in this litigation. The
11 opinions in the reports of Drs. Vogelzang and Desai are not their own, but rather were
12 developed and written hand-in-glove and after numerous and lengthy discussions with
13 Drs. Resnick and Lewandowski. Although Dr. Resnick attests that "[t]he Vogelzang and
14 Desai reports were based on their clinical experience and their review of medical
15 literature, which they independently developed in their own careers and through their own
16 research and their review of medical literature provided by counsel for plaintiffs," Ex. 3 to
17 Pl. Opp. Br., at ¶ 4, Dr. Resnick omits critical facts that are reflected in the SBBK
18 invoices: Dr. Resnick spent 21 hours reviewing material as part of his work as a
19 plaintiffs' expert; he spent 9.5 hours conferring with the plaintiffs' counsel; he spent 4.5
20 hours meeting with his Northwestern colleagues about the litigation; and he spent 25.5
21 hours writing the three reports that Drs. Vogelzang and/or Desai signed. Thus, although
22 Dr. Resnick claims that "my role in creation of these reports was modest and supportive
23 relative to the changes," *id.* para. 8, he actually spent 60.5 hours on the project as of
24 April 2017, and he has billed more than \$30,000 for his work. As the SBBK invoices

25
26 ¹ Dr. Resnick's claim that he did not receive "Bard's defense theories" should carry little
27 weight and does not address Bard's contention that he received core work product and
28 attorney mental impressions. Regardless of Dr. Resnick's view of his three-hour long
meeting with Bard's counsel after reviewing medical records and medical literature
selected by Bard's counsel, Bard submits that Dr. Resnick received core work product and
attorney mental impressions.

1 reflect, the scope of Dr. Resnick’s work is identical to that of Drs. Vogelzang, Desai, and
 2 Lewandowski, and Dr. Resnick’s total time on the reports is also similar to the time spent
 3 by Drs. Vogelzang, Desai, and Lewandowski, who billed 74.25 hours, 81.75 hours, and
 4 49.25 hours, respectively.² Accordingly, the opinions of all four doctors are inseparably
 5 intertwined.

6 Moreover, although Drs. Vogelzang and Desai attest in nearly identical language in
 7 their affidavits (Paragraph 4 of Exhibits 1 and 2 to the plaintiffs’ opposition) that they did
 8 not receive any mental impressions of Bard’s attorneys, their claim does not seem
 9 credible. Both physicians worked closely with Dr. Resnick for the entirety of the project,
 10 and Dr. Resnick could not possibly have walled off the confidential information that he
 11 received from Bard even if he tried. *Michelson, Michelson v. Merrill Lynch Pierce*
 12 *Fenner & Smith, Inc.*, 1989 WL 31514, at **3-4 (S.D.N.Y. Mar. 28, 1989) (conversations
 13 with moving party “could subliminally affect his testimony and assessment of facts” and
 14 “try as he might, [he] cannot possibly create separate spaces within his memory”);
 15 *Auto-Kaps, LLC v. Clorox Co.*, 2016 WL 1122037, at *5 (E.D.N.Y. Mar. 22, 2016) (“[a]n
 16 expert cannot build a Chinese wall in his own mind, despite his best efforts to do so”).
 17 Moreover, Bard still does not know the full scope of the physicians’ communications
 18 among themselves. And while Bard has requested all such communications, and this
 19 Court ordered in CMO-26 that “Plaintiffs shall produce communications among their
 20 experts to Defendants,” and “[i]f Plaintiffs conclude that any such communications are
 21 properly withheld, they shall provide Defendants with a privilege log that identifies the
 22 specific basis which Plaintiffs’ conclude that the communications are protected under
 23 Rule 26(b),” the plaintiffs have produced neither the communications nor a privilege log.
 24 Given the inconsistency between Dr. Resnick’s affidavit about the scope of his work and
 25 what the contemporaneously created invoices reveal, the communications among the
 26

27 _____
 28 ² Even if Dr. Resnick were to step aside, per the agreement with plaintiffs’ counsel, he
 would still receive one quarter of the fees that SBBK receives.

1 experts could reveal similar inconsistencies between the experts' affidavits and what was
2 actually communicated.

3 The plaintiffs also argue that Bard has identified no case law extending
4 disqualification from a non-testifying consultant to a testifying expert, but the plaintiffs do
5 not address a critical issue raised in Bard's motion: SBBK as an entity, which includes
6 Drs. Vogelzang, Desai, Resnick and Lewandowski, should be disqualified because
7 Dr. Resnick, a conflicted and undisclosed expert, closely collaborated on the opinion and
8 expert reports of his SBBK colleagues. Numerous courts, including in the Ninth Circuit,
9 have analyzed disqualification of entities when individuals within those entities provide
10 expert opinions to opposing parties. *See Kane v. Chobani*, 2013 WL 3991107, at *5 (N.D.
11 Cal. Aug. 2, 2013) (finding that confidential relationship and exchange of confidential
12 information between moving party and experts in consulting firm merited disqualification
13 of entire firm from serving as an expert for the plaintiff, including the CEO of EAS who
14 did not previously consult with the defendants); *Mays v. Reassure Am. Life Ins. Co.*, 293
15 F. Supp. 2d 954, 957-958 (applying two-prong expert disqualification analysis to CPA
16 firm); *In re Ambassador Group, Inc.* 879 F. Supp. 237, 241-246 (same). Thus, under this
17 framework, whether Drs. Vogelzang and Desai, as individuals, had a confidential
18 relationship with Bard is irrelevant.

19 Dr. Resnick's extensive relationship with Bard, and his collaboration on the
20 plaintiffs' expert reports, should disqualify SBBK as a whole. The plaintiffs should not be
21 able to successfully argue on the one hand that Drs. Vogelzang and Desai as individuals
22 are immune from disqualification because they did not have a confidential relationship
23 with Bard, but on the other hand allow a clearly conflicted SBBK colleague to collaborate
24 extensively on, draft, and bill comparable time for the reports of Drs. Vogelzang and
25 Desai. This is exactly the type of "inappropriate expert conduct" that threatens judicial
26 integrity, and underscores why entities as a whole are eligible for disqualification. And
27 when considering that disqualification is designed to ensure that one party is not unfairly
28 disadvantaged when its confidential information is in the hands of an opposing expert,

1 Drs. Vogelzang, Desai, Resnick, and Lewandowski should be disqualified whether viewed
2 as individuals or as the SBBK entity.

3 Finally, disqualifying Drs. Vogelzang, Desai, Resnick, and Lewandowski does not
4 amount to “fundamental unfairness” as the plaintiffs argue. The plaintiffs’ claim that
5 Bard employed “dilatory tactics” (Pl. Resp. at 13) in the timing of its motion to disqualify
6 is inaccurate. But Bard only learned the extent of Dr. Resnick’s collaboration after the
7 June 5 and 6, 2017, depositions of Drs. Vogelzang and Desai when counsel for Bard asked
8 about Dr. Resnick’s involvement in this litigation and discovered that it was extensive
9 when the plaintiffs produced the invoices for SBBK. At that point, Bard expeditiously
10 analyzed the relevant law, conferred with the plaintiffs, and filed its motion to disqualify.
11 Moreover, if one party is going to be prejudiced by an expert’s conflict of interest, it
12 should be the party that created the conflict—the plaintiffs could have prevented this issue
13 by asking at the outset whether Drs. Vogelzang, Desai, Resnick, and Lewandowski had
14 previously provided any expert or consulting work to Bard. Because they did not, the
15 experts’ work in this litigation has resulted in, and will continue to result in, irreparable
16 harm to Bard.

17 For all of these reasons, and as further discussed in Bard’s motion, Drs. Vogelzang,
18 Desai, Resnick, and Lewandowski should be disqualified as experts for the plaintiffs.

19 RESPECTFULLY SUBMITTED this 4th of August, 2017.

20
21 s/ Richard B. North, Jr.

22 Richard B. North, Jr.

23 Georgia Bar No. 545599

24 Matthew B. Lerner

25 Georgia Bar No. 446986

26 NELSON MULLINS RILEY & SCARBOROUGH, LLP

27 Atlantic Station

28 201 17th Street, NW / Suite 1700

Atlanta, GA 30363

PH: (404) 322-6000

FX: (404) 322-6050

richard.north@nelsonmullins.com

matthew.lerner@nelsonmullins.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

James R. Condo (#005867)
Amanda Sheridan (#027360)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren
Phoenix, AZ 85004-2204
PH: (602) 382-6000
jcondo@swlaw.com
asheridan@swlaw.com

**Attorney for Defendants C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.**

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

s/Richard B. North, Jr.
Richard B. North, Jr.

Nelson Mullins Riley & Scarborough

L.L.P.
201 17th Street NW, Suite 1700
Atlanta, GA 30363
(404) 322-6000